

NO. 41689-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALFRED JOHNSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Faith Ireland, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS IN REPLY

Appellant, Alfred Johnson, was convicted of second degree assault and felony harassment for an incident that occurred in the downstairs office of Johnson's restaurant and involved his former girlfriend, Senara Moli-Pouesi. CP 1-2, 50. Johnson's opening appellate brief raised two issues¹ on appeal: first, whether the trial court erred in refusing to give a no duty to retreat instruction, see Brief of Appellant (BOA), at 12-15; and second, whether several instances of prosecutorial misconduct deprived Johnson of his right to a fair trial. BOA, at 15-27.

On the first issue, the state asserts that Johnson had no opportunity to retreat, and that the instruction was therefore inappropriate. Brief of Respondent (BOR), at 13-15. On the second issue, the state claims that the alleged instances of prosecutorial misconduct were either not preserved for review or did not constitute misconduct. BOR, at 16-28.

¹ Mr. Johnson has raised several additional issues in his pro se brief.

The underlying facts are adequately set forth in the appellant's opening brief, and in the state's response -- with the following exception. In its statement of facts, the state asserts that Johnson was holding a gun in his hand when the officers entered the restaurant's downstairs office:

As the officers entered, the defendant pulled Ms. Moli-Pouesi up by the neck between the police and himself as if using her for a shield. The defendant held a gun in his hand, which he laid down behind him.

BOR, at 10 (citing 4RP 133-34). This statement is inaccurate.

Officer Berg, whose testimony the state was citing, actually testified that Johnson probably was not holding a gun in his hand when the officers entered:

I saw the victim was bent over at the waist, suspect had her back with his left hand, the back of the neck, it looked like he saw me, started pulling her up, his hand came back here, came up with a gun as he took a step back (demonstrating), he put it in the folder behind him, a white file folder[.]

4RP 133 (emphasis added). Berg's testimony indicates that Johnson probably removed the gun from his clothing, i.e. from the back of his pants, upon

seeing the police.² In any event, Berg was not at all sure where the gun came from -- as he later clarified:

I didn't see where [the gun] came from. I don't know if he had it in his hand initially, or in his pocket, I don't know.

4RP 134 (emphasis added). Consequently, the state's factual assertion is not supported by the record.

B. ARGUMENT

1. THE JURY COULD HAVE CONCLUDED FLIGHT WAS A REASONABLY EFFECTIVE ALTERNATIVE TO JOHNSON'S USE OF FORCE.

Johnson testified that when he was in the downstairs office with Moli-Pouesi, she became enraged "like a wild animal" and jumped on his back. 5RP 176. Instinctively, Johnson turned and threw her. 5RP 176. Based on this testimony, the court properly instructed the jury on self-defense.

6RP 105. The court refused to give Johnson's proposed no duty to retreat instruction, however. 6RP 113; CP 45. This was error.

Contrary to the state's response, a jury could

² Johnson did have a concealed weapons permit. 5RP 177.

have believed that flight was a reasonably effective alternative to Johnson's use of force. Although the window of opportunity may not have been exceedingly long, a jury could have concluded that Johnson should have left as soon as Moli-Pouesi showed signs of becoming enraged. In addition, the prosecutor argued that Johnson's use of force was not lawful because he did not reasonably believe he was about to be injured. 6RP 130-32. This argument could have given the jury the mistaken impression that Johnson had no right to stand his ground and repel the attack. The no duty to retreat instruction would have alleviated this possible misconception. This court should therefore reverse Johnson's assault conviction.

2. THE PROSECUTOR'S REMARKS WERE IMPROPER AND ARE PRESERVED FOR REVIEW.

In his opening brief, Johnson argued that several instances of prosecutorial misconduct deprived him of his right to a fair trial. BOA, at 16-27. Specifically, Johnson alleged that the prosecutor: (1) violated an in limine ruling in an attempt to ambush him while testifying; (2) made sarcastic comments that expressed the prosecutor's

personal belief regarding Johnson's guilt and credibility; and (3) referred to rape cases in his closing argument in an attempt to appeal to the jury's passions and prejudices.

a. Violation of the in Limine Ruling

The state acknowledges that defense counsel immediately objected and moved for a mistrial when the prosecutor cross-examined Johnson regarding an alleged prior assault where Johnson was accused of biting a customer's ear. BOR, at 19. Nevertheless, the state claims the issue is not preserved for review because defense counsel did not state a specific basis when asking for the mistrial, and because the issue of the in limine ruling was not brought to the court's attention. BOR, at 20. This argument elevates form over substance.

"[T]he purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Under the circumstances here, the court was clearly apprised of the claimed error by defense counsel's objection

and motion for a mistrial. Moreover, contrary to the state's assertion, the court's in limine ruling was discussed. 5RP 182. When the prosecutor reminded the court that he previously submitted a police report to substantiate the prior assault,³ the court replied, "[a]nd I certainly haven't made any ruling, have I, with regard to it, have I?" The court's comments show it was well aware of its earlier ruling at the time of the objection.

Despite the state's argument to the contrary, by springing this prejudicial evidence of other prior "bad acts" during Johnson's cross-examination, the prosecutor expressly violated the court's in limine ruling. The court had ruled that the only prior "bad acts" to be admitted were the

³ The prosecutor submitted the referenced police report at the same time he submitted reports describing prior instances of abuse between Johnson and Moli-Pouesi -- i.e. at the in limine hearing. 3RP 6; Supp CP ____ (sub. no. 23C, State's Trial Memorandum, 9/15/97), see attached police reports. Although the court ruled the prior instances between Johnson and Moli-Pouesi were sufficiently corroborated and relevant to show the reasonableness of Moli-Pouesi's fear with respect to the felony harassment charge, the court indicated the alleged incidents involving other parties would require a completely different analysis. 2RP 22.

instances between Johnson and Moli-Pouesi. Although the court did not rule that the other alleged instances involving other parties were per se inadmissible, the court was clear that further analysis would be necessary. 3RP 22. The prosecutor's request for a sidebar during Johnson's direct testimony does not excuse the violation. He was obliged to renew his request before ambushing Johnson on cross-examination. The court agreed, stating:

Okay, a police -- what the Court has to do in order for the Court to allow other evidence, other specific evidence of character to come in, a Court has to make a prior determination, first of all, that this probably occurred.

Now I have to read the police report or make that kind of a determination before this kind of evidence is offered, and you should know that Mr. Lind.

5RP 182 (emphasis added). The prosecutor's cross-examination was obviously inappropriate and therefore constituted misconduct.

b. The Prosecutor's Expression of Personal Opinion

Johnson also argued that on at least two occasions, the prosecutor improperly expressed his personal opinion regarding Johnson's credibility. BOA, at 21-24. The first comment occurred when the

prosecutor was questioning Johnson about his plan to meet Bobby Milton, and about the weapons discovered in Johnson's possession when police broke into the office. When Johnson replied that he didn't use the weapons, the prosecutor then stated, "Well, I'm not talking about for Ms. Moli-Pouesi, you were certainly able to handle yourself with her, but I'm talking about for Mr. Milton." 6RP 33-34. The second comment occurred when the prosecutor was questioning Johnson regarding how Moli-Pouesi sustained her injuries. The prosecutor exclaimed "What a coincidence" when Johnson explained how Moli-Pouesi must have bruised her knees. 6RP 44.

In response, the state only addresses the prosecutor's first comment.⁴ BOR, at 25. Without explanation, the state asserts the issue has not been preserved for review. The state further points out that no curative instruction was requested. BOR, at 26. Contrary to the state's assertion, however, defense counsel immediately

⁴ The state must therefore concede that the "What a coincidence" comment was inappropriate. BOA, at 23-24.

objected and moved to strike on grounds that the prosecutor was making a comment, not asking a question. 6RP 34. Accordingly, error from the prosecutor's comment is preserved for review. Moreover, because defense counsel's objection was overruled, it would have been silly for him to then ask for a curative instruction.

c. The Cumulative Effect of the Prosecutor's Misconduct Prejudiced Johnson and Denied Him a Fair Trial.

The combination of the above-referenced misconduct, combined with the prosecutor's rape case comment, see BOA, at 24-27, deprived appellant of his right to a fair trial. See State v. Suarez-Bravo, 72 Wn. App. 359, 367-68, 864 P.2d 426 (1994) (the cumulative effect of prosecutorial misconduct requires reversal where there is a substantial likelihood the jury's verdict was affected thereby); see also, State v. Torres, 16 Wn. App. 254, 263-65, 554 P.2d 1069 (1976) (same proposition). Assuming arguendo that any one of the incidents of misconduct did not, standing alone, deny Johnson a fair trial, the cumulative effect of all the prosecutor's misconduct taken as a whole did deny Johnson a fair trial. Therefore, reversal of both Johnson's assault and harassment conviction is warranted.

C. CONCLUSION

For the reasons argued herein and in appellant's opening brief, this Court should reverse both of Johnson's convictions.

DATED this ____ day of May, 1999.

Respectfully submitted,

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